Supreme Court, U.S.
FILED
JUN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Writ of Certiorari to the Supreme Court of Texas

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 12, 1990
CERTIORARI GRANTED APRIL 16, 1990

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* The opinions of the Supreme Court of Texas, the Court of Appeals of Texas, and the district court are reprinted in the appendix to the petition for a writ of certiorari at Pet. App. 1a-16a, 17a-24a, and 25a-26a, respectively, and have not been reproduced here. Likewise, the judgment of the Supreme Court of Texas, and its order denying rehearing, are reprinted in the appendix to the petition at 27a and 28-29a, respectively, and are not reproduced here.

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IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND COMPANY D/B/A
INGERSOLL-RAND COMPANY CONSTRUCTION
EQUIPMENT GROUP

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
07/10/84	Plaintiff's Original Petition filed
08/16/84	Defendant's Original Answer and Interrogatories filed
02/04/85	Plaintiff's First Amended Petition filed
02/05/85	Defendant's Answers to Plaintiff's Interrogatories filed
02/05/85	Oral Deposition of Perry McClendon conducted
02/05/85	Oral Deposition of Warren J. Carroll conducted
06/10/87	Defendant's Motion for Summary Judgment filed
07/20/87	Plaintiff's Response to Motion for Summary Judgment filed
07/22/87	Defendant's Reply to Plaintiff's Response to Motion for Summary Judgment filed

DATE	FILINGS-PROCEEDINGS
07/27/87	Plaintiff's Second Amended Original Petition filed
07/27/87	Plaintiff's Motion for Leave to File Amended Petition filed
07/31/87	Order Granting Defendant's Motion for Summary Judgment filed
08/27/87	Appeals Bond to Court of Civil Appeals filed
12/13/89	Order Reversing and Remanding received

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME
JUDICIAL DISTRICT OF TEXAS
AT HOUSTON, TEXAS

No. C14-87-00768-CV

PERRY MCCLENDON,
Appellant

v.

INGERSOLL-RAND COMPANY D/B/A
INGERSOLL-RAND COMPANY CONSTRUCTION
EQUIPMENT GROUP,
Appellee

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
09/29/87	Appeal filed
01/08/88	Issues joined
07/21/88	Opinion filed—affirmed
08/05/88	Petition for Rehearing filed
08/18/88	Order overruling Petition for Rehearing filed
09/19/88	Writ of Error filed

IN THE SUPREME COURT OF TEXAS

No. C-7973

PERRY MCCLENDON,
Petitioner
v.
INGERSOLL-RAND COMPANY D/B/A INGERSOLL-RAND COMPANY CONSTRUCTION EQUIPMENT GROUP,
Respondent

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
10/03/88	Application for Writ of Error received
02/22/89	Order Granting Application for Writ of Error filed
02/22/89	Writ of Error issued
03/22/89	Oral Argument held
10/18/89	Opinion filed—reversed and remanded
10/18/89	Dissenting Opinion by Gonzalez, J., joined by Phillips, C.J., and Hecht, J., filed
10/18/89	Dissenting Opinion by Gonzalez, J., filed
10/19/89	Judgment Letter issued
11/02/89	Petition for Rehearing filed
11/15/89	Order overruling Petition for Rehearing filed
12/11/89	Mandate issued
01/04/90	Motion to Recall Mandate filed
01/08/90	Order overruling Motion to Recall Mandate filed
02/26/90	Notice of Filing of Petition for a Writ of Certiorari to United States Supreme Court received
05/02/90	Order granting Motion for a Stay Order

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON
v.
INGERSOLL-RAND CO. D/B/A INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP

PLAINTIFF'S ORIGINAL PETITION

[Filed July 10, 1984]

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PERRY McCLENDON, hereinafter called Plaintiff, complaining of INGERSOLL-RAND CO. dba INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, hereinafter called Defendant, and for cause of action would respectfully show unto the Court and Jury as follows:

I.

Plaintiff is a resident of DeSoto, Dallas County, Texas.

Defendant is a corporation, joint venture, partnership or some other type of business entity having offices and doing business in Harris County, Texas and may be served with citation through the Secretary of State of the State of Texas by mailing to 200 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07675.

II.

This cause of action arises out of a premature and wrongful termination of Plaintiff's employment by Defendant on or about November 19, 1982. This termination violated and breached a contract with, agreements with and promises to Plaintiff, who had worked for Defendant for some nine (9) years and eight (8) months.

III.

Defendant's termination of Plaintiff was with unreasonably short notice, without good and reasonable cause, and/or done in bad faith. Defendant's actions and wrongs in this regard have resulted in damage and injury to Plaintiff.

IV.

As a consequence and result of Defendant's wrongful actions Plaintiff has sustained a loss of income and commission, personal expense and inconvenience, loss of employee benefits and profit sharing and retirement programs, sleeplessness, nervousness and mental anguish and emotional distress.

V.

Because of the above and foregoing, Defendant should compensate Plaintiff for his losses and injuries and damages, and Defendant should also be required to pay exemplary damages by virtue of their conduct and the circumstances surrounding this termination. Plaintiff also seeks recovery of pre-judgment interest and attorney's fees, in a reasonable and just amount. Plaintiff's damages greatly exceed the minimum jurisdictional limits of this Court.

VI.

At the time of his termination Plaintiff was 45 years of age, with a life expectancy of 29.1 years, according to the United States Life Tables, 1978, Volume II, Section 5, a certified copy of which will be used by Plaintiff as evidence in the trial of this case, and Defendant is hereby notified of said intent.

VII.

By reason of all of the above and foregoing, and on account of the injuries suffered by your Plaintiff on the occasion made the basis of this suit, your Plaintiff is entitled to recover damages from Defendant in an amount greatly in excess of the minimum jurisdictional limits of the Court, which amount will be more specifically stated prior to the submission of this case to the Jury.

WHEREFORE, PREMISES CONSIDERED, your Plaintiff prays that the Defendant be cited in terms of law to appear and answer herein, and that upon final trial of this case, he have judgment against the Defendant, in an amount greatly in excess of the minimum jurisdictional limits of the Court, which amount will be more specifically stated prior to the submission of this case to the Jury; that he have interest on the judgment at the legal rate; that he recover costs of Court in this behalf expended, and that he have such other and further relief, both general and special, legal and equitable, to which he may show himself justly entitled and in duty bound will ever pray.

Respectfully submitted,

HELM, PLETCHER & HOGAN
2800 Two Houston Center
Houston, Texas 77010-1084
(713) 654-4464

/s/ Michael Y. Saunders
MICHAEL Y. SAUNDERS
State Bar Number 17684000
Attorneys for Plaintiff

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

vs.

INGERSOLL-RAND CO. d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

DEFENDANT'S ORIGINAL ANSWER AND SPECIAL EXCEPTIONS

[Filed August 16, 1984]

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Ingersoll-Rand Co., d/b/a Ingersoll-Rand Co. Construction Equipment Group, hereinafter called Defendant, and makes and files the following Original Answer to the Plaintiff's Original Petition as authorized by Rule 92 of the Texas Rules of Civil Procedure. Subject to said Answer, the Defendant also makes and files the following Special Exceptions to the Plaintiff's Original Petition as authorized by Rule 91 of the Texas Rules of Civil Procedure. In support thereof, the Defendant would show the Court as follows:

ORIGINAL ANSWER

I.

Defendant hereby makes and asserts a general denial as authorized by Rule 92 of the Texas Rules of Civil

Procedure to the allegations contained in the Plaintiff's Original Petition. Defendant denies each and every, all and singular, the allegations and statements contained in the Plaintiff's Original Petition and demands that the Plaintiff prove its case by a preponderance of the evidence before this Honorable Court and Jury.

SPECIAL EXCEPTIONS

Subject to the foregoing Original Answer, the Defendant urges the following Special Exceptions to the Plaintiff's Original Petition as authorized by Rule 91 of the Texas Rules of Civil Procedure.

I.

Defendant specially excepts to that allegation contained in Paragraph II of the Plaintiff's Original Petition wherein it is stated that "this cause of action arises out of a premature and wrongful termination of Plaintiff's employment by Defendant . . ." The Defendant specially excepts to this allegation because it is vague, general, unspecific and does not fully apprise the Defendant [sic] the proof it will be required to meet at the trial of this cause. Specifically, this allegation fails to identify or otherwise describe the nature of employment allegedly terminated by the Defendant, nor does it specify or describe how this alleged termination was in any way "premature and wrongful."

II.

Defendant also specially excepts to that allegation contained in Paragraph II of the Plaintiff's Original Petition wherein it is alleged that "this termination violated and breached a contract with, agreements with and promises to Plaintiff . . . ." Said allegation is vague, general, unspecific and fails to apprise the Defendant of the proof it will be required to meet at the trial of this cause. Specifically, this allegation does not identify or otherwise describe the terms and provisions of the alleged

"contract" made with the Plaintiff, nor does it specify the terms and provisions of the alleged "agreements with and promises to [the] Plaintiff. . ."

III.

The Defendant specially excepts to that allegation contained in Paragraph III of the Plaintiff's Original Petition wherein it is alleged that "Defendant's termination of Plaintiff was with unreasonably short notice, without good and reasonable cause, and/or done in bad faith" in that said allegations are vague, general, unspecific and do not fully apprise the Defendant of the proof it will be required to meet at the trial of this cause. More specifically, this allegation does not specify what notice was provided to the Plaintiff nor how said notice was "unreasonably short." Further, said allegations do not specify how Defendant's alleged termination of the Plaintiff was "done in bad faith."

IV.

Defendant specially excepts to that allegation contained in Paragraph III of the Plaintiff's Original Petition wherein it is alleged that "Defendant's actions and wrongs in this regard have resulted in damage and injury to Plaintiff." This allegation is vague, general, unspecific and does not apprise the Defendant of the proof it will be required to meet at the trial of this cause. Specifically, this allegation does not specify what "actions and wrongs in this regard" are being complained of, nor does it identify or describe in any [sic] the "damage and injury" allegedly done to the Plaintiff as a result of this alleged termination.

V.

Defendant specially excepts to those allegations contained in Paragraph IV of the Plaintiff's Original Petition wherein it is alleged that "Plaintiff has sustained a loss of income and commission, personal expense and in-

convenience, loss of employee benefits and profit sharing and retirement programs . . ." Said allegation is vague, general, unspecific and does not fully apprise this Defendant of the proof it will be required to meet at the trial of this cause. Specifically, these allegations do not state the amount of the losses complained of by the Plaintiff.

VI.

Defendant specially excepts to the allegations contained in Paragraph V of the Plaintiff's Original Petition wherein it is stated that "Defendant should compensate Plaintiff for his losses and injuries and damages . . . ." Said allegation is vague, general, unspecific and fails to apprise the Defendant of the proof it will be required to meet at the trial of this cause. Specifically, this allegation does not state the nature and extent of the alleged "losses and injuries and damages" the Defendant should be required to pay.

VII.

The Defendant specially excepts to that portion of Paragraph V of the Plaintiff's Original Petition wherein it is alleged that "Defendant should also be required to pay exemplary damages by virtue of their conduct and the circumstances surrounding this termination." Said allegation is vague, general, unspecific and fails to fully apprise this Defendant of the proof it will be required to meet at the trial of this cause. Specifically, this allegation fails to specify or describe the nature of the alleged conduct and circumstances "surrounding this termination" which would justify an award of exemplary damages.

VIII.

Defendant specially excepts to that portion of Paragraph V of the Plaintiff's Original Petition wherein it is alleged that "Plaintiff also seeks recovery of prejudgment interest and attorneys fees, and a reasonable and

just amount. Plaintiff's damages greatly exceed the minimum jurisdictional limits of this court." The Defendant specially excepts to this allegation because it is vague, general, unspecific and does not apprise the Defendant of the proof it will be required to meet at the trial of this cause. Specifically, these allegations do not state the specific amount of prejudgment and attorneys fees the Plaintiff seeks to recover, nor does it state the legal or statutory basis which would authorize the recovery of such interest and fees in this cause. Further, these allegations do not state the total amout of prejudgment interest and attorneys fees sought by the Plaintiff in this cause.

IX.

Defendant specially excepts to that portion of Paragraph VII of the Plaintiff's Original Petition wherein it is alleged that "your Plaintiff is entitled to recover damages from Defendant in an amount greatly in excess of the minimum jurisdictional limits of the Court, which amount will be more specifically stated prior to the submission of this case to the jury." This allegation is vague, general, unspecific and does not fully apprise the Defendant of the proof it will be required to meet at trial. More specifically, the Plaintiff has failed to state the specific amount of damages it seeks recovery of in this trial.

WHEREFORE, PREMISES CONSIDERED, Ingersoll-Rand Co., d/b/a Ingersoll-Rand Co. Construction Equipment Group, Defendant, respectfully requests that this Honorable Court take notice of the filing of these Special Exceptions and set same for hearing; and that, upon hearing same, that this Court enter an Order striking the Plaintiff's pleadings or requiring the filing of amended pleadings containing more specific information about the nature of the Plaintiff's claims and causes of action and the nature and extent of the Plaintiff's alleged damages. The Defendant also prays for such other and further

relief to which it may show itself justly entitled to receive.

Respectfully submitted,

GILPIN, MAYNARD, PARSONS,
POHL & BENNETT

By /s/ Jeffrey R. Parsons/wth
JEFFREY R. PARSONS
State Bar No. 15547200
1300 Post Oak Blvd.
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(713) 623-8800
Attorneys for Defendant,
Ingersoll-Rand Co. d/b/a
Ingersoll-Rand Co.
Construction Equipment Group

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

[Filed February 4, 1985]

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PERRY McCLENDON, hereinafter called Plaintiff, still complaining of INGERSOLL-RAND CO. dba INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, hereinafter called Defendant, and for cause of action and by way of amended Petition would respectfully show unto the Court and Jury as foliows:

I.

Plaintiff is a resident of DeSoto, Dallas County, Texas.

Defendant has been served with citation herein and has filed its Answer. Any further service will be effected on its attorney of record.

II.

This cause of action arises out of a premature and wrongful termination of Plaintiff's employment by De-

fendant on or about November 19, 1982. This termination violated and breached a contract with, agreements with and promises to Plaintiff, who had worked for Defendant for some nine (9) years and eight (8) months.

III.

Defendant terminated Plaintiff one (1) day after he was notified of same, without good and reasonable cause and/or in bad faith. Said termination was without good cause and in bad faith for the reason that Plaintiff had nine (9) years and eight (8) months of service with Defendant, which was four (4) months prior to the date his retirement and pension benefits with Defendant would have vested. Furthermore, Plaintiff would show that his job position was not eliminated but filled with another employee. Defendant's actions and wrongs as heretofore described have resulted in damage and injury to Plaintiff as hereinafter stated. Alternatively, Plaintiff would show that Defendant defrauded him of his pension and retirement benefits by terminating him four (4) months prior to his completion of ten (10) years of service. Plaintiff's termination was a willful and intentional act by Defendant.

IV.

As a consequence and result of Defendant's wrongful actions and breaches, Plaintiff has sustained a loss of income and commission, personal expense and inconvenience, loss of employee benefits and profit sharing and retirement programs, sleeplessness, nervousness and mental anguish and emotional distress. Plaintiff, therefore, seeks recovery in the amount of SEVEN HUNDRED FIFTY-THOUSAND DOLLARS ($750,000.00).

V.

Because of the above and foregoing, Defendant should compensate Plaintiff for the above losses, injuries and damages. Furthermore, as a result of the unconscionable and willful actions of Defendant in terminating Plaintiff

prior to the time that his retirement benefits had vested and awarding the sales territory he had developed to another individual without just cause, Plaintiff is entitled to recover exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00). Pursuant to Article 2226 of the Texas Revised Civil Statutes, it has been necessary for Plaintiff to employ the undersigned counsel to represent him in this case, for which he is entitled to reasonable attorney's fees, together with pre-judgment interest on the liquidated amount of damages sustained by Plaintiff.

VI.

At the time of his termination, Plaintiff was 45 years of age, with a life expectancy of 29.1 years according to the United States Life Tables, 1978, Volume II, Section 5, a certified copy of which will be used by Plaintiff as evidence in the trial of this case, and Defendant is hereby notified of said intent.

VII.

By reason of all of the above and foregoing, and on account of the injuries suffered by your Plaintiff on the occasion made the basis of this suit, your Plaintiff is entitled to recover actual damages in the amount of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) and exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00).

WHEREFORE, PREMISES CONSIDERED, your Plaintiff prays that the Defendant be cited in terms of law to appear and answer herein, and that upon final trial of this case, he have judgment against the Defendant for actual damages in the amount of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) and exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00); that he have interest on the judgment

at the legal rate; that he recover costs of Court in this behalf expended, and that he have such other and further relief, both general and special, legal and equitable, to which he may show himself justly entitled, and in duty bound will ever pray.

Respectfully submitted,

HELM, PLETCHER, HOGAN
BOWEN & SAUNDERS
2800 Two Houston Center
Houston, Texas 77010-1084

/s/ Michael Y. Saunders
MICHAEL Y. SAUNDERS
State Bar Number 17684000
W. ALLYN HOAGLUND
State Bar Number 09736500
Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

vs.

INGERSOLL-RAND CO. d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

**DEFENDANT'S ANSWERS TO
PLAINTIFF'S INTERROGATORIES**

[Filed February 5, 1985]

TO: Plaintiff, Perry McClendon, by and through his attorney, Michael Y. Saunders, Helm, Pletcher & Hogan, 2800 Two Houston Center, Houston, Texas 77010

COMES NOW Ingersoll-Rand Co., d/b/a Ingersoll-Rand Co. Construction Equipment Group, Defendant in above-entitled and numbered cause, and files these its Answers to Interrogatories propounded by Plaintiff, Perry McClendon.

Respectfully submitted,

GILPIN, MAYNARD, PARSONS
POHL & BENNETT

By /s/ William T. Little
WILLIAM T. LITTLE
State Bar No. 12427100
1300 Post Oak Blvd.
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(713) 623-8800
Attorney in Charge for
Defendant, Ingersoll-Rand
Company d/b/a Ingersoll-Rand
Construction Equipment Group

[Certificate of Service Omitted in Printing]

ANSWERS TO INTERROGATORIES

1. The Defendant OBJECTS to this Interrogatory in that it is vague, general, broad and unspecific. Further, it requires the Defendant to review and evaluate the Plaintiff's pleadings in order to make a legal determination as to what facts are "relevant to any issue in this case." As such, this Interrogatory calls for information which is outside the scope of discovery as provided for by Rule 166b of the Texas Rules of Civil Procedure. Until the Plaintiff has filed amended pleadings in accordance with the Defendant's Special Exceptions, it will not be possible to provide a fully responsive Answer to this Interrogatory.

   Without waiving any part of the foregoing objection, the Defendant would provide the following list of individuals who have some knowledge of facts which may be relevant to some of the issues in this case: Mr. Warren J. Carroll, the Plaintiff's immediate supervisor during the period 1978—November of 1982; Mr. Fred Ferguson, Mr. Carroll's predecessor and the Plaintiff's immediate supervisor for mid 1978 to early 1981; Mr. Richard Olmen, immediate supervisor of Mr. Carroll and Mr. Ferguson during the period 1979 through November of 1982; Mr. Barry Uber, Mr. Olmen's predecessor; Mr. Roy Dueitt, the "inside sales and rental Manager" in daily contact with salesmen to provide them with administrative and technical support; Mr. Bob Bushman, service manager in charge of providing technical services to the salesmen; and Mr. Dick Jefferies, the salesman who took over the Plaintiff's territory after he was laid off in November of 1982.

2. At this time, the Defendant has neither consulted with nor selected any experts for consultation in connection with this case.

3. The Defendant has taken no written statements from anyone concerning this lawsuit.

4. The Defendant OBJECTS to the use of the term "terminate" with regard to the Plaintiff's separation from Ingersoll-Rand. As will become clear during the course of discovery in this cause, the Plaintiff was laid off. Mr. Warren J. Carroll, the Plaintiff's immediate supervisor, and Mr. Dick Olmen, Mr. Carroll's supervisor, discussed the layoff of the Plaintiff. Mr. Dick Niffin was also involved in consultations regarding this layoff.

5. The Defendant again OBJECTS to the use of the term "terminate" in this Interrogatory with regard to the circumstances of the Plaintiff's separation from Ingersoll-Rand. As previously stated, the Plaintiff was laid off. Mr. Warren J. Carroll made the "final decision" to lay the Plaintiff off.

6. The Defendant OBJECTS to Interrogatory No. 6 in that it does not seek to obtain access to any information which is relevant or material, nor does it seek to obtain access to any evidence which may lead to the discovery of relevant or material evidence. As such, the information requested in Interrogatory No. 6 is outside the scope of discovery provided for by Rule 166b of the Texas Rules of Civil Procedure.

7. Again, the Defendant OBJECTS to the use of the term "terminate" with regard to the separation of the Plaintiff from Ingersoll-Rand. As previously stated, the Plaintiff was laid off.

   Without waiving this OBJECTION, the Defendant would state that the decision to lay the Plaintiff [sic] was made by Mr. Warren J. Carroll based upon his review and evaluation of internal performance related documents and records, true and accurate copies of which have been separately provided to the Plaintiff in response to his Request for Production. The decision to lay the Plaintiff off was reached after counseling with the Plaintiff for several months and after consultation between Mr. Carroll and Mr. Olmen.

8. Once again, the Defendant OBJECTS to the use of the term "terminated" in this Interrogatory when referring to the circumstances of the Plaintiff's separation from Ingersoll-Rand. As previously stated, the Plaintiff was laid off.

   Without waiving this objection, the Defendant would provide the following information in response to this Interrogatory:

   Because of very poor market conditions in 1982 which had an adverse effect on Ingersoll-Rand, a company-wide effort was undertaken to reduce operating expenses. Part of this effort required a reduction in force with regard to employees. This reduction in force was accomplished on a company-wide basis and affected all divisions and branches and all levels of employment.

   With regard to the Plaintiff, management was requested to evaluate all salesmen in his branch and to make a determination as to who would be laid off based upon overall job performance.

   During the second half of 1982 and the first half of 1983, approximately eight (8) Ingersoll-Rand employees (including the Plaintiff) were separated from employment by means of lay off or early retirement.

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared WARREN J. CARROLL, Vice President and Branch Manager of Houston—Ingersoll-Rand Equipment Sales, Houston Texas, and acknowledged that he has read the foregoing Answers to Interrogatories and the same are true and correct.

/s/ Warren J. Carroll
WARREN J. CARROLL
Vice President and Branch Manager—Houston—Ingersoll-Rand Equipment Sales, Houston Texas

SUBSCRIBED AND SWORN TO BEFORE ME on this the 5th day of February, 1985.

/s/ Barbara K. Roberts
BARBARA K. ROBERTS
Notary Public in and for the State of Texas

My Commission Expires: 8/14/85

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

vs.

INGERSOLL-RAND CO., d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

DEPOSITION OF PERRY McCLENDON

February 5, 1985 Houston, Texas

* * * *

[26] Q. And how are they dependent?

A. I pay child support to them on a monthly basis, as well as some additional items of necessity.

Q. Do they live with their mother?

A. Yes, sir. They do.

Q. And what is her name?

A. Linda Ruth McClendon.

Q. When were you and Linda Ruth McClendon divorced?

A. In April of 1977.

Q. And how long have you and your current wife, Linda, been married?

A. Since November 5th of last year.

Q. November of 1984?

A. Yes, sir.

Q. When did you first come to work with Ingersoll-Rand, Mr. McClendon?

A. I started to work for them for the Air Power Division of Ingersoll-Rand August 1st, 1972.

Q. And what kind of work did you do for them when you commenced that employment?

A. I was a territorial salesman working with an end distributor that they had. And I also worked end users.

[27] Q. What do you mean when you say "end users"?

A. Well, a customer that represented Ingersoll-Rand's products that the independent distributor was not responsible for, sir.

Q. Is an independent distributor actually with other customers, like a middleman between you and someone else?

A. Yes, sir. Excuse me. Yes, sir. They bought air compressors from the manufacturer and sold them to their particular clientele.

Q. And how long totally did you work for Ingersoll-Rand before you were separated in November of 1982?

A. I worked for them until the 19th of February, 1977, that first—

MR. HOAGLUND: Do you understand the question?

THE WITNESS: Beg pardon?

MR. HOAGLUND: He asked you how long you worked for them prior to November, 1982.

THE WITNESS: I beg your pardon.

Q. (By Mr. Little) Your petition says nine years, eight months; is that right?

[28] A. Yes, sir. I thought you asked me how long I worked for them on that.

Q. I'm sorry. I may have been unclear. I'm interested in the total period of employment from 1 August of '72 until the time that you left in August of '82.

A. It's my understanding that I served with them for nine years, eight months and ten days.

Q. What kind of work, generally speaking, did you do during that period of time?

A. Well, I was a territorial manager, working with independent distributions that we have in the area and calling on certain contractors and clients that we as manufacturers needed to contact directly, sir.

Q. Were you a salesman during that period of time?

A. It did involve sales, yes, sir.

Q. Did you have the same kind of job during the whole tenure with Ingersoll-Rand?

A. No, sir.

Q. Okay. How did it change from the job that you just described for me?

[29] A. Well, the earlier assignment was more involved with direct sales to the end users. The latter assignment was more involved with an independent distributor network that we had working with their principals of their company and their sales personnel, and still doing some—some contacting of certain contractors for products that our independent distributors did not represent, sir.

Q. Now, you had a break in service sometime during those nine years, eight months and ten days; is that correct?

A. Yes, sir.

Q. Can you tell me about when that occurred?

A. Yes, sir. I left Ingersoll-Rand February 19th, 1977. And I was re-hired by them November the 28th, 1977.

Q. Why did you have this break in service in 1977?

A. Well, I wanted to return to Houston for personal reasons. And Ingersoll-Rand did not have any positions that were available for me in Houston. And so I left the company and did find employment in this [30] area, and in November of 1977 was re-contacted by them and re-hired for a suitable position.

Q. Did you do a different type of work during the second period with Ingersoll-Rand as compared to the work you did in the first period?

A. Slightly different, sir.

Q. Now, the first period in August of '72 to February of '77, where did you work, generally?

A. Okay. I hired on with the Air Power Group of Ingersoll-Rand in 1972 and was transferred to San Antonio the next year and was active in locating and setting up an independent distributor for covering of our products. I would say in October of 1975 I was hired by an Ingersoll-Rand company-owned operation in Dallas, and I did transfer in December of 1975 and served as a salesman for the company-owned branch until I left the company in 1977, on that February the 19th.

* * * *

[35] Q. Did you know Mr. Heath prior to coming back to work for Ingersoll-Rand?

A. Casually.

Q. And you had stayed in touch during this month to see if anything was going to come open in the sales area, in the Houston area?

A. Yes, sir.

Q. Who did you work for when you came back in 1977?

A. I reported to Bob Heath.

Q. Did you supervise any employees yourself?

A. No, sir.

Q. I take it you had a change in sales territory at the time?

A. Yes, sir. That's true. I had a territory that was defined as the Central and South Texas territory.

Q. And you were based out of Houston to service that territory?

A. Yes, sir. I was based out of Houston, but [36] in June of 1978 I moved to San Antonio, which put me in the heart of my territory, sir.

Q. Did you stay in San Antonio until you left the company in November of 1982?

A. No, sir. I was transferred to the Dallas territory December 29, 1979.

Q. Did your job change at that time?

A. To some degree. We had a better distributor network in that territory, and so it did change. And some of the products I represented changed slightly.

Q. In the past it had been stationary air compressors. What additional products did you start handling when you moved to Dallas?

A. Okay. Well, with this assignment that I mention that started in November of 1977, we were handling what was defined as a Construction and Mining Group products, which included products such as portable air compressors, compaction equipment, rock drills, handheld demolition equipment, equipment such as that, sir.

* * * *

[60] Q. That would be like a year-end sale at the department store or something like that?

A. Yes, sir.

Q. Something that you really couldn't anticipate at the start of the year?

A. That's true, sir.

Q. So other than the Compensation Arrangement, there was no other document as to compensation and commission structure?

A. That's correct, to the best of my recollection, sir.

Q. Okay. Were there any other agreements or contracts or documents that you signed or were furnished that addressed other aspects of your employment with Ingersoll-Rand?

A. Well, there were certain company programs or benefits, if you are referring to those, [61] sir, that are available in pamphlets or one thing or another that define programs, such as profit sharing or retirement benefits, but no written document that I had to sign, sir.

Q. Okay. Was the Compensation Arrangement the only document that you were ever presented by Ingersoll-Rand and requested to sign that concerned any aspect of your employment with the company? When I ask that question, I'm not interested in documents such as withholding certificates that you might sign for payroll or

applications for insurance coverage, things of that sort. I'm talking about any other document concerning the guarantees, warranties, representations that might have been made to you or list of your obligations that you had to sign while you worked with the company.

A. There was a form that dealt with ethics and good, honest business tactics that we did sign at some time back, but that's the only thing that I can recall at all.

Q. Did you sign that on just one occasion?

A. I can just recall one occasion, sir.

* * * *

[75] Q. Do you recall if you received any such commission checks at any time during the year 1982?

A. Yes, sir. I received several.

Q. Do you recall if you received any commission checks during the year 1981?

A. Yes, sir. The majority of the months.

Q. Okay. So it was possible for you to earn a commission on the sales that you were generating on a month-to-month basis even if you didn't meet your quota for the entire year?

A. Yes, sir. That's correct.

Q. Okay. Now, you only worked through the middle of November of 1982; that was a month and a half short of an entire year.

A. Through November 19th, sir.

Q. Okay. I asked you a question a moment ago about whether or not you made your quota for 1982 and you answered no. Was that because you only worked ten and a half months in 1982?

A. That would be partly correct, but 1982 was a [76] devastating year for our particular industry.

Q. What do you mean when you say "a devastating year"?

A. Well, there were trends in the marketplace that made us not be able to achieve what we had hoped to achieve.

Q. Were there other salesmen that you knew about in your branch that were not meeting their quotas in 1982?

A I wouldn't know specifically, sir.

Q. You were having trouble, though, nonetheless, in 1982?

A. Well—

MR. HOAGLUND: Meeting his quota?

MR. LITTLE: Yes.

THE WITNESS: I was not on target to meet that quota.

Q. (By Mr. Little) Do you know how close you came in terms of percentage?

A. No, sir. I do not recall the percentage.

Q. Do you attribute, then, as one of the reasons you were unable to meet your quota in 1982 to this bad market or devastating [77] financial effects that you referred to a moment ago?

A. Partly that, and the other part being that the year '81 had been a very respectable year for us. And a lot of the dealers had ordered late in that year, which affected their need to re-order for 1982.

Q. Were you encouraged by your supervisor at Ingersoll-Rand to try and meet your quota or exceed it every year?

A. Certainly so.

Q. What happened at the end of the year when you weren't able to meet or exceed your quota?

A. Well, you know, they would look at your territory and go over the numbers and see why you weren't able to achieve what you had, what you were allocated for the year.

Q. Would that result in any sort of change in the quota that you were given for the following year?

A. It could, sir, depending on the reason for the lack of business.

* * * *

[81] Q. Are you saying to me, then, that you may have talked about it but nothing got changed?

A. The managers had the ability to massage those numbers or change them if something devastating happened to your territory, if distributors cancelled or something. So really, the numbers that appear on there are not ironclad and unchangable.

Q. Did you ever ask anybody to change your numbers for the year 1982?

A. I don't recall having done so.

Q. Okay. Now, again, you referred to 1982 as a devastating year. Are you talking about a devastating year for your branch at Ingersoll-Rand or for the whole company or what?

A. I'm talking about the compressor industry, which was mainly what we were involved with. And due to some circumstances in the marketplace, it just—it just did not enjoy the year that typically we would.

Q. Were customers that you had previously been getting orders from just not placing orders in 1982?

[82] A. Yes, sir. Both distributors and end users that weren't certain of the economy; the recession hit, and they just weren't ordering new equipment.

Q. Was that reflected in the commissions you were paid in 1982?

A. Yes, sir.

Q. Do you know if that was a common experience of the other salesmen working in your branch at Ingersoll-Rand during 1982?

A. I wouldn't know, sir.

Q. You didn't ever talk to them about it?

A. Not about their income.

Q. Do you know what other effects the general market conditions in 1982 had on Ingersoll-Rand?

A. Well, sure. It was very hard on them, depending on which division you are talking about, which product. But I don't know the end results throughout the respective group, sir.

Q. Let me make it more specific. Do you know what effects, if any, 1982's bad market had on your branch, your division of Intersoll-Rand and your product line?

[83] A. Yes, sir. The demand for our products was such that they were so limited that the company had to let some people go.

Q. Do you know about how many people were let go during 1982 as a result of these market conditions?

MR. HOAGLUND: In his area?

Q. (By Mr. Little) In your branch and division of Ingersoll-Rand.

A. I don't know the exact number, sir.

Q. Do you recall the names of anybody that might have been let go in your branch at this time?

A. Oh, there were some people in our office staff, some of our mechanics, people like that. I don't know that I recall all of their respective names.

Q. Did you ever have occasion to meet with or talk with any other salesmen in your branch in 1982 about how their business and how their customers were doing?

A. We would meet at meetings that we had. However, we did kind of hold back our meetings in 1982 because the budget was [84] hard-pressed for that kind of thing. But it was common knowledge that the business trend was very bleak.

Q. Did anybody at Ingersoll-Rand ever inform you about what steps were being taken to meet these economic problems in 1982, specifically within your branch and division?

A. Well, you mean what actions they were taking to try to amend that?

Q. Yes, sir.

A. Well, Mr. Carroll informed myself, as I presume he informed his entire staff, that he would receive mandates to reduce the size of his force.

Q. When did he first discuss that with you?

A. Oh, let's see, sir. I suspect probably approximately the middle part of the year. I don't know that I could state an exact month, sir.

Q. Summer of 1982?

A. That would be accurate, sir.

Q. And how did that particular discussion come about?

A. Well, you know, we would call the office and [85] there would be fewer people there or Mr. Carroll would be in my territory and we would discuss the, you know, the business in general and the fact that various people were having to leave the company. And it was, you know, it was looking very serious.

Q. Can you recall about how many times you had occasion to talk to Mr. Carroll about this particular problem during 1982?

A. Well, I would say we traveled extensively through my territory on a couple of times and that was the subject that we discussed, you know, at great lengths, probably multiple times, three or four. I don't know the exact number, sir.

Q. When you say "traveled together," he would physically go with you into your sales territory?

A. Yes, sir.

Q. Would it be on a call to a customer, on a trip to see a customer, or what?

A. A call to go conduct business with one of our distributors in the territory or to call on some potential clients.

Q. Did he ever—when I say he, I mean [86] Mr. Carroll—did Mr. Carroll ever discuss with you in 1982 the possibility of laying off any salesmen doing the kind of job that you were doing?

A. Yes, sir. It was understood that probably some number of sales personnel would have to be relieved of their job.

Q. Do you recall when that specific conversation might have taken place?

A. I don't recall the exact month, sir. But it was probably September or something like that.

Q. This would be September of 1982?

A. Yes, sir.

Q. Okay. And, again, what might have been the occasion for that conversation?

A. Well, whenever I had the regional manager in my territory, I would want to find out as much as I could about the business trend, how the factories were going, how the region was going. And we would discuss the fact that—and we did, in fact, discuss the fact that personnel had to be let go down there.

* * * *

[92] Q. Can you tell me what time period you are talking about you had these conversations?

A. He just—well, he would share with me whatever knowledge he had. But as far as knowing just when they would call him and tell him to let people go, he made no special claim about that.

Q. When is the last conversation that you had with Mr. Carroll concerning your sales quota and whether or not you would be laid off?

A. Well, again, I don't think we talked much more about quotas at the time of the year because we knew that it was a disastrous year.

Q. So in the fall of '82 the handwriting was on the wall; quotas were just out the window?

A. Yes, sir. And that certain numbers of people would no longer be employed by Ingersoll-Rand.

[93] Q. And it just became a matter of who and when?

A. I think that's a safe appraisal.

Q. Okay. When were you notified that you were one of the individuals to be laid off?

A. On November the 18th.

Q. And who notified you?

A. Mr. Carroll, by telephone.

Q. The layoff was to be effective when?

A. The next day.

Q. On the 19th of November?

A. Yes, sir.

Q. Tell me what he said to you in the conversation.

A. Well, I was talking to him about business in general, and he interrupted me asking me if I was sitting

down. And then he informed me that he was going to have to let me go and that the next day, the 19th, would be my last day. And he apologized and gave me specific instructions about taking my company car to a location for him to pick it up, hopefully the next day.

Q. What was your response?

A. I asked him if there was going to be any kind of severance pay or any—we had [94] discussed things like that, the company negotiating length of time with the company. And as I recall, his comment was that he would—that I would be receiving two weeks' pay, which I interpreted as being my vacation pay. And that's about all that I recall.

Q. Do you recall a specific discussion about whether or not you would receive a severance pay, and if so, in what amount?

A. I recall a conversation where Mr. Carroll told me that a lot of people around the country had been let go from the firm and that a lot of them had a lot more time and service than myself, and that the company was taking that into consideration and that likely there would be some form of compensation—excuse me—compensation that would take into account your length of time with the company.

Q. Were you ever given any severance pay?

A. I was given the two weeks' pay, which I kind of interpreted as being my vacation pay that I came within one month of earning. And I did receive three more commission checks, [95] sir.

Q. Do you receive all of the commission payments that you felt you were entitled to as of the 18th of November, 1982?

A. As of the 18th of November?

Q. Yes, sir.

A. It's my understanding that—you mean as of that date or I was entitled to effective that date? Excuse me.

Q. Let me clarify. That's fine. Let's assume that the 19th of November, 1982, was your last day at work.

Now, you had earned some commissions through that date which hadn't been paid to you as of that time?

A. Yes, sir.

Q. Is it your understanding that you were paid all of the commissions that you had earned through the 19th of November, 1982?

A. Yes, sir. It is my understanding that they did pay me the commissions that I was entitled to, based on the compensation agreement.

Q. So you have no dispute at this time that you have not been paid any commission that you might have earned?

[96] A. No dispute with that, sir.

Q. Okay. Did they make any kind of accommodation with regard to insurance coverages?

A. I believe they left that in effect for an additional 30 days.

MR. LITTLE: Mark that as 8.

(Defendant's Exhibit No. 8 was marked for identification and is attached hereto.)

Q. (By Mr. Little) Mr. McClendon, I will show you a document which has been marked for identification as Defendant's Exhibit No. 8 and ask you if you can identify that for me.

A. It's a form that's labeled "Salaried Personnel Change Authorization."

MR. HOAGLUND: Have you ever seen that form before?

THE WITNESS: I don't recall having seen it.

* * * *

[99] Q. Okay. What kind of response did you get when you made those inquiries to Mr. Carroll?

A. Well, he was very encouraging. Nothing had really changed in his region. One occasion he mentioned being aware of somebody that might be looking for somebody.

Q. Was he ever able to promise you that you would be re-hired as of a specific date?

A. No, sir.

Q. Was anybody else ever able to do that for you?

A. No, sir.

Q. When Mr. Carroll called you on the 18th of November, 1982, did he discuss the possibility with you of re-assigning you to another job at another branch somewhere else in the company?

A. No, sir. That was not discussed.

Q. Did you ask him about that possibility?

A. No, sir. We did not discuss that.

Q. Is there any reason that you didn't ask him [100] about the possibility of re-assignment within the company at that time?

A. Well, they were letting off vast numbers of individuals from Ingersoll-Rand. And many people had much more seniority than myself. So I don't recall any conversation that gave any hope towards being transferred to some other group.

Q. I take it, then, that you had enough information about the state of the company to reach a conclusion in your own mind that a re-assignment was not feasible, due to the poor performance of the company in 1982 and the need to make other layoffs?

A. Yes, sir. I understood that.

Q. On any of those subsequent occasions, that is, after the 19th of November, 1982, when you spoke with Mr. Carroll or other people at Ingersoll-Rand, did you discuss the possibility of coming back to work in another capacity?

A. I think I would use terms like, "Is there anything in the area that I might be considered for that my qualifications would meet," things, you know, vague terminology, [101] sir.

Q. You would have considered employment with Ingersoll-Rand after the 19th of November of 1982 in another capacity, then?

A. Yes, sir. One that would enhance my needs and their needs.

Q. What kind of job besides working in a sales area would you consider yourself qualified to handle for Ingersoll-Rand?

A. Well, I would say that I would listen to anything that they would have had in marketing, or there were some conditions under which I would have done anything to have completed my time, some additional time with them in some capacity that would have met both of our needs.

Q. What do you mean when you say "complete your time with Ingersoll-Rand"?

A. Well, I would have liked to have completed the ten years of service which would have effected my profit sharing and my possible retirement with the company. . . .

* * * *

[108] Q. Okay. We had just spoken a moment ago about retirement. I believe you told me that it was your understanding that an employee with more than ten-years' service had vested a right to some sort of retirement income; is that correct?

A. Yes, sir.

Q. What is your understanding of your rights as an Ingersoll-Rand employee with ten-years' service to a retirement program?

A. Well, it's my understanding—and I have sent documents that cover that—again, it's my understanding that with ten-years' service and based on some formula that they use for some period of your income, that at age 55 or 65 at some point in time, sir, you are qualified for some financial benefits on a retirement-type program.

Q. Is it your understanding that you actually [109] have to retire from Ingersoll-Rand before you receive any of this money?

A. I don't know of anyone that gets it that's still employed by them.

Q. So you have to have at least ten years in?

A. I think that's the minimum, sir.

Q. You have to retire and you have to be a certain age before you are paid any portion of this money?

A. Yes, sir. That's my thought.

Q. And your understanding is that the amount of money that you are paid in retirement is determined by a formula applied to your salary while you are actually working at Ingersoll-Rand?

A. Yes, sir.

Q. Do you have any idea of what amount of money you are talking about in your case?

A. I do not know exactly, sir. But on a monthly basis —I do not know, but I know it's more than I have if I don't get it.

Q. Is it your understanding that had you left Ingersoll-Rand with more than ten years of service that you would have been entitled to the payment of this retirement even if you [110] retired from another job after working for an additional period of time?

A. I don't know the answer to that, sir. I don't know if working somewhere else would have eliminated me from receiving that from Ingersoll-Rand. I would assume that it does not.

Q. The only information you have about the retirement program is what's contained in the documents that you have provided us with?

A. Yes, sir.

Q. Okay. At the time Mr. Carroll called you up and told you that you were being laid off, did you discuss the matter of your benefits with him? And by that I mean, did you discuss your contributions to the savings plan or your retirement?

A. We did not. There is a vague chance that he mentioned that they would extend the insurance for an additional month or for some time frame, but other than that, we did not discuss—when I asked him about would

there be any severance pay or separation pay as we discussed in the past, he said two or [111] three weeks.

Q. Did you ever have at any time a discussion with Mr. Carroll about those benefits that we have talked about here, the profit sharing and the retirement?

A. I don't think we did, sir.

Q. Do you remember having any discussions at any time from the date you were laid off forward with anybody at Ingersoll-Rand about your interest in the profit sharing plan or your interest in the retirement?

A. No, sir.

Q. Besides the retirement and the savings we have talked about, are there any other benefits that you feel you have been deprived of as a result of being laid off?

A. Well, again, I understood that they would probably take in time—excuse me— in consideration [of] the length of time I had been with the company, I seem to recall that Mr. Carroll mentioned that they had some formula where they would give you a week or two-weeks' pay, something to that effect, for each year's service; that they were trying to do something honorable about the [112] fact that they had to let a lot of people go.

Q. So you are talking about here the possibility of some one-time payment of an amount to be determined based on seniority and things of that sort to partially compensate for the fact that you were being laid off?

A. Well, I did not know and still do not know any formula that they have. But I was of the opinion that they would again take into consideration—I didn't know if they give you one lump sum or say, "Hey, you are so close to ten-years' service, when you get 55 you will qualify for this." I didn't know what they were doing. We did not discuss that, sir.

Q. Okay. Do you know if you have ever received any payment of that sort?

A. No, sir. I have not received any payment like that.

Q. Other than those conversations with Mr. Carroll and other people at Ingersoll-Rand, have you exchanged

any correspondence with anybody at Ingersoll-Rand since the [113] date you were laid off?

A. Not regarding these subjects.

Q. Have you exchanged correspondence with anybody at Ingersoll-Rand on any subject?

A. No, sir. Not exchanged correspondence.

Q. Do you ever remember at any time going up to anybody at Ingersoll-Rand since 19 November, 1982, and saying, "I'm just a few days short of my retirement; why can't I stay on until I vest?"

A. Well, I thought—I thought that my position had been terminated and they didn't have anything for me to do; my job had been eliminated and there was no—I didn't know of any method that I could stay on.

Q. Okay.

MR. LITTLE: Why don't we re-mark this First Amended Original Petition as Defendant's Exhibit No. 9.

(Defendant's Exhibit No. 9 was marked for identification and is attached hereto.)

* * * *

[125] Q. You don't know if people have been forced to take on more work because you have the same amount of business and fewer employees to take care of it?

A. I have no idea about that, sir.

Q. Okay. I would like to give you an opportunity to review Roman numeral III of Plaintiff's Exhibit No. 9 and I have some questions for you about that.

A. Okay.

Q. Mr. McClendon, have you read through paragraph III of your petition that's marked as Defendant's Exhibit No. 9?

A. Yes, sir. I have.

Q. Okay. Reference is made in the second sentence there that said termination is without cause and in bad faith. Is it your position that you were laid off by Ingersoll-Rand simply to deprive you of your benefits

that you have discussed here with us, the savings and the retirement?

A. No, sir. It is my position that my assignment was not eliminated, apparently, and that some other individual, at some [126] expense, was transferred to that area to take that assignment, and while it is true me being let go at that particular time frame does apparently cost me those benefits that I would have been entitled to with four more months of service, sir.

Q. Did anyone tell you you were being laid off because your position was being eliminated?

A. No, sir.

Q. What information do you have to support the allegations in this paragraph that your termination was allegedly willful and intentional and constituted fraud so as to deprive you of your benefits and your retirement benefits?

A. I think those facts speak for themselves. If I had had ten-years' service I would have qualified for those other programs, which would have benefited me.

Q. They would have been paid to you?

A. At some point in time, if we are talking about the retirement.

Q. Okay.

A. So that does translate to a savings for the company and nothing for me, sir.

[127] Q. Are you aware of any specific document that's in existence that says "we should let Mr. McClendon go because if we don't we will have to pay him retirement and we will have to pay him his profit sharing contributions"?

A. I'm not aware of any document; that's why I'm seeking a judge or jury to rule.

Q. Okay. And are you aware of anybody that said that to you, on behalf of Ingersoll-Rand, that "we are letting you go because we don't want to pay you this

money that you might become entitled to in a few more weeks"?

A. No one has said that, sir. But the fact remains that the effect will be the same.

Q. What you are doing is you are saying "I was let go with nine years, eight months and ten-days' service; if they would have kept me a little bit longer I would have been entitled to it. Since they didn't keep me I don't get it, therefore I have been defrauded of it." Is that your position?

A. That's basically my position. I could have earned it on my own if they had shown the [128] compassion; that my position was not eliminated. I would have earned it on my own, sir.

Q. Because your position was not eliminated you felt you could have stayed on at least long enough to qualify for those benefits?

A. Yes, sir. Again, if I had been an engineer for one of our factories and they shut down the whole factory and let go 1,000 people, that would be different. But that's not the case, sir.

Q. Are you aware of anybody else that was let go in late 1982 or early 1983 under similar circumstances?

A. I wouldn't know the exact details of their circumstances, sir. But obviously a lot of people were let go.

Q. Okay. No specific individual comes to mind who was either fired or laid off or something of that nature this close to vesting in these benefits?

A. None that I would know specifically about, sir.

* * * *

[146] Q. Are you aware of any documents that would exist anywhere which would outline this decision to single you out and terminate your employment so as to deprive you of your retirement benefits, anything like that?

A. I'm not aware of any documents to that effect, sir.

Q. Are you aware of anybody at Ingersoll-Rand that might have wanted to accomplish that goal?

A. Well, you know, again it becomes a business decision. Some manager or his boss has to decide if they have got to let some people go. They decide which one to let go and which one to keep.

Q. Is it your position that one—in this lawsuit, that one of the reasons they decided to let you go as opposed to anybody else is because you were so close to vesting in these retirement benefits and profit sharing plan?

A. Well, it would sure make you wonder, sir. But somebody else will have to come up with [147] that answer. I don't know.

Q. Right now all you can do is guess about that?

A. The savings are reflected that, you know, they will benefit by that, sir.

Q. Again, Mr. McClendon, I don't mean to argue with you at all. I'm just trying to understand what information you might have to lead to that conclusion. And if all it is is a speculation on your part, then that's what I need to know. If somebody has told you that or handed you a letter saying that, then I need to know about it. That's what I'm asking about here now.

A. It is my opinion and my thinking that in the act of letting me go to give my assignment to someone else, surely they should have been aware that that represented a nice savings to the company. And I mean, that's just a fact. And I feel like having served them for that period of time that that should have been dealt with. And because I'm not sure, that's why I'm going to a third party for their ruling on that issue, sir.

[148] Q. Okay. Your position basically is they can save more money by laying you off as opposed to somebody else who is not as close to retirement or vesting in these rights and benefits?

A. It did have that effect, sir.

Q. And again right now nobody has told you that that's why you were laid off and you are not aware of any specific facts; it's just your conclusion or your point of view from looking at the facts that are available to you at this time?

A. Yes, sir. I have no document where somebody can say there is a conspiracy or anything like that, sir.

* * * *

INGERSOLL-RAND

SALARIED PERSONNEL CHANGE AUTHORIZATI(

CONFIDENTIAL

(See reverse side for instruct

☐ EMPLOYMENT ☐ MERIT INCR ☐ PROMOTION ☐ TRANSFER ☐ TERMINATION ☒ OTHER

DATE PREPARED: 11 - 18 - 82 (mo day 19)

EFFECTIVE DATE: 11 - 19 - 82 (mo day 19)

PRESENT STATUS (Complete For All Changes)

Last	First	Middle Initial	EMPLOYEE NO	DIV/ACCOUNT NO
McClendon	Perry	M.		15-028

☒ Exempt ☐ Non Ex.
☐ Regular ☐ Tempor
☐ Direct ☐ Indirect
☐ Off & Admin ☐ Eng

JOB TITLE: Distributor Representative II

JOB DESCRIPTION NO:

DAILY TIME CARD: ☐ YES ☒ NO

LOCATION (Div Dept Branch): CEG Houston

EDUCATION: ☐ H S or LESS ☐ 2 YR TECH ☐ 4 YR ENGINEERING ☐ 4 YR COLLEGE (Other Than Engr) ☐ MASTER ☐ PH D

SOCIAL SECURITY NO: 457 : 56 : 1092

NET DATE STARTED (Re): 8 - 1 - 72 (mo day 19)

EMPLOYMENT
☐ NEW HIRE
☐ RETURN ☐ RE-HIRE

HOME ADDRESS: Street No & Name / City / State / Zip

DATE OF PREV SEPARATION: mo day 19

BIRTH DATE (mo day 19)	MAR STATUS	CITIZEN	SALARIED PERS REQ NO		PERSON REPLACED
				☐ REPLACEMENT ☐ ADDITION TO FORCE	

TRANSFER OR OTHER JOB CHANGE

☐ JOB REVISION
☐ TRANSFER FROM HOURLY
☐ TRANSFER – Explain Under Remarks

NEW JOB TITLE	NEW JOB DESCRIPTION NO	NEW DIV-ACCOUNT NO	☐ Exempt ☐ Non-Ex.
NEW LOCATION (Div Dept Branch)	REPLACEMENT REQUIRED ☐ YES ☐ NO	DAILY TIME CARD ☐ YES ☐ NO	☐ Regular ☐ Tempor ☐ Direct ☐ Indirect ☐ Off & Admin ☐ Eng

TERMINATION

☐ RESIGNATION ☐ RETIREMENT ☐ REDUCTION IN FORCE ☐ DISCHARGE ☐ DEATH ☒ OTHER – Explain Under Remarks

VACATION AUTHORIZED	VACATION TAKEN	CONTINUE SALARY PAYMENTS UP TO AND INCLUDING	VACATION DUE	TERMINATION PAY	REPLACEMENT REQU
2 (wks)	1 (wks) 0 (days)	~~11 - 30 - 82~~ (mo day 19) plus	1 (wks) 0 (days) plus	3 (wks)	☒ YES ☐ NO

SALARY OR SALARY CHANGE — Evaluation Pts

☐ NO CHANGE

PRESENT SALARY: $ ____ Per ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr

PROPOSED CHANGE: $ ____ % Per ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr ☐ MERIT ☐ PROMOTION ☐ ADJUSTMENT ☐ OTHER – Explain Under Remarks

PROPOSED SALARY: $ ____ Per ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr

PAID BY (FACILITY)

RATE RANGE: ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr
MIN $ ____
MID $ ____
MAX $ ____

LAST CHANGE: $ ____ % Per ☐ Wk ☐ Twice a Mo ☐ Mo ☐ Yr
DATE (mo day 19)
☐ MERIT ☐ PROMOTION ☐ ADJUSTMENT ☐ OTHER – Explain Under Remarks ☐ GEN INCREASE

SALES

WILL OPERATE COMPANY CAR: ☐ YES ☐ NO

COMPENSATION DETAILS –

Jan 3/83 PK

RELOCATION EXPENSES

RELOCATION EXPENSES	ESTIMATED COST	CHARGE TO (Location)	DIV ACCOUNT NO	AUTHORIZED BY
☐ YES ☐ NO				

REMARKS (If more space is required attach a separate sheet)

This is a lay off due to the economic conditions of the day. Perry will receive three (3) weeks termination pay plus his due vacation and all commissions that are due him until the effective date, 11-19-82. We will continue to cover him and his family on our medical and hospitalization plan until ~~the end of 1982~~. Jan 31, 1983 per REK 12/3/82

Will advise on health Ins.

APPROVALS (Name & Dept)

	DATE		DATE
[illegible]	11/15/82	[illegible]	11/22/82

SALARY COMMITTEE: 12 Jan 83 LUC REK FM

FINAL APPROVAL: DATE

DEFENDANT'S EXHIBIT 2-3-85 NO. 8

46

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

vs.

INGERSOLL-RAND CO., d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

DEPOSITION OF WARREN J. CARROLL

February 5, 1985 Houston, Texas

* * * *

[25] Q. And for sales personnel such as Mr. McClendon, he would be one that would be involved in going around and attempting to sell Ingersoll-Rand's products to distributors or people that were in need of an end use of those products; is that correct?

A. Yes.

Q. He would not be involved in the sale of products from the company store?

A. There was some crossover there. There would be a situation where there might be a customer that we would determine we would have to sell direct on a piece of used equipment that maybe one of his distributors would want to buy, and it would be purchased through the store.

Q. But I mean he wouldn't be located physically in this store and be expected to sell like you were over at Foley's or something?

A. No.

Q. Now, how many salesmen did you have that worked for you in this C & M Group here in Houston during 1981?

[26] A. You need to explain that. The total number of salesmen that worked for me in this organization I had?

Q. Yes, sir.

A. Okay.

Q. I mean, is describing it the C & M Group a fair way to do that?

A. I had six—right—I had six salesmen and one sales manager.

Q. Who was the sales manager?

A. Dick Jeffries.

Q. Who did he report to?

A. Me.

Q. Who reported to him?

A. Three salesmen of the six.

Q. Who were those salesmen that reported to Mr. Jeffries?

A. Dan Jones, John Cagel, and Tom Matthews.

Q. Are any of those gentlemen currently employed by Ingersoll-Rand?

A. Dan Jones is.

Q. The other two are not?

A. No, sir.

Q. When was Mr. Cagel terminated?

A. Mr. Cagel?

* * * *

[38] Q. So none of your superiors had anything to do with the decision to lay off Mr. Reese; is that right?

A. No. The only part they play in it is business was going down; you've got to do something. That's in a normal day-to-day conversation with my boss, but the decision lies with me.

Q. Well, what guidelines did you receive from your supervisory personnel, sir, as to what you were to do with the sales personnel that were under your supervision?

A. General guidelines of good management.

Q. Well, I mean did they tell you at some point in time, "Look, Mr. Carroll, things are bad and we are going to have to get rid of 50 percent of your staff"? Did they tell you something like that?

A. Indirectly, yes, but not at 50 percent. We talked about how we would manage it, what we have to do, total expense money and how you are going to run the branch. That is an ongoing thing with your superiors. How you do it is really up to the individual.

Q. Well, did they ever provide you with any [39] guidance as to the number of employees that were under your supervision that were to be let go?

A. An exact number?

Q. Yes, sir.

A. I don't remember them saying an exact number.

Q. Well—

A. It relates to dollars and cents and so, you know, they probably did say, okay, that probably would mean five or four or eight or three. But, you know, it's not a direct order to lay off five people.

Q. Because what they are really concerned with was the bottom line whether or not you are making any money in your group?

A. That's correct.

Q. So from the standpoint of an individual, they didn't care how many individuals that you had working for you; they just wanted to know whether or not your group was producing a profit; is that correct?

A. That's correct.

Q. So if your branch was performing to such an extent that it was having tremendous loss, [40] as far as they were concerned, you could get rid of everybody in the branch, theoretically; isn't that right?

A. That's right.

Q. So that leeway and the determination as to how to best budget and run your operation was left to you; is that right?

A. Yes.

Q. And if they weren't satisfied with the way that you were doing it, then obviously they would see that somebody else filled your position; is that correct?

A. That's correct.

Q. And so you obviously wanted to do everything that you possibly could to insure that you protect[ed] your position and also to look out for the best interests of your people; is that correct?

A. That's correct.

Q. And make a profit for the company from your operations?

A. Yes.

Q. Is Mr. LaBlanc still employed by Ingersoll-Rand?

A. Yes.

* * * *

[52] Q. So you asked that he transfer to the Dallas area?

A. That's correct.

Q. And he did?

A. Yes.

Q. From the time that he moved to Dallas until the time that he left the employment of Ingersoll-Rand, were you satisfied with his job performance?

A. Yes.

Q. You don't have any complaints about that?

A. Well, general complaints about any salesman, but it was adequate. He did a fair job in doing his job.

Q. Okay. There wasn't anything where he was doing something on the side that in any way made you feel like he was being disloyal in any way to his employer, Ingersoll-Rand?

A. Not that I know of. The only thing that people had told me, he was involved in the [53] Amway thing, which I did not find out from him until later. But that's,

you know—as long as—I kept thinking, well, as long as the business came in, that didn't bother me.

Q. Did you ever have any discussions with him in that respect?

A. Yes. Finally during that last year, 1982.

Q. What was the nature of those discussions?

A. He was telling me about it.

Q. Were you satisfied with the way that he was acting as a salesman on behalf of Ingersoll-Rand during that period of time?

A. During 1982?

Q. Yes, sir.

A. Yes.

Q. I mean, understanding the market conditions.

A. Yes.

Q. So would it be fair to say to this jury that there is not anything that you can pinpoint and say, "We feel that Mr. McClendon was deficient in this area"; is that correct?

A. Well, if you wanted to outline every single thing, I mean, you could say each salesman—Perry might not have done reports as well as another one and things [54] like that, which we discussed continually during his performance, but if you take everything, it was a fair performance.

Q. He gave an overall good performance for his employer; is that correct?

A. Yes.

Q. He was a good employee?

A. Yes.

Q. Now, who made the determination to terminate Mr. McClendon?

A. I did.

Q. And did you receive any guidance whatsoever from any of your superiors with respect to that particular decision?

A. Other than like I said before, in general, not particular.

Q. Okay. In other words, I just wanted to be sure I understand the facts of the situation. Your immediate boss, Mr. Olmen, or his immediate boss, Mr. Wendel, did not call and say, "Perry McClendon has got to go"?

A. No.

Q. Okay. So once again, it was based upon your determination of what you felt was best for [55] the company; is that correct, in your position as branch manager?

A. That's correct.

Q. And you made the determination that because of the considerations you had to make that Mr. McClendon's position—not his position—but that he should no longer be an employee of Ingersoll-Rand; is that right?

A. Right.

Q. Okay. And at that time, you were aware of the amount of tenure that he had with Ingersoll-Rand, were you not?

A. No. That did not come into play. I guess I should have looked it up, but I didn't.

Q. Well, I mean, clearly, that wasn't any secret, was it?

A. No.

Q. I mean, all you would have to do was look in his personnel file and you could have determined how long he had been an employee of Ingersoll-Rand, could you not?

A. Right.

Q. Or you could have asked the personnel office as to what the amount of his longevity with the company was at that time, could you not?

[56] A. Yes.

Q. You chose not to do so? Is that what you are saying?

A. I didn't choose. That just never even crossed my mind.

Q. You just didn't even think of that?

A. That wasn't part of the decision in analyzing which salesmen stayed and which one left.

Q. Have you told me about all the salesmen within your group that were laid off by Ingersoll-Rand during 1982?

A. To my knowledge. I covered—well, Perry and Tom Reese. And Tom Matthews left on his, you know, just resigned. And—yes.

Q. So three out of your six salesmen during 1982 either quit or were laid off or were terminated; is that right?

A. That's correct.

Q. Three remained?

A. Three remained.

Q. In addition to your sales manager?

A. That's correct.

Q. Now, was Mr. McClendon's position eliminated after the time that he was laid off?

[57] A. No.

Q. Who took his position?

A. Dick Jeffries.

Q. Mr. Jeffries at that time was the sales manager of the Houston branch, isn't that right?

A. That's correct.

Q. And he was transferred then from the sales manager of the Houston branch to take over Mr. McClendon's position in the northern part of Texas; is that right?

A. That's correct.

Q. Did anyone replace Mr. Jeffries as sales manager?

A. No.

Q. What happened with that position?

A. In the total reduction and everything, everybody had to do a little more, including me.

Q. Well, what happened to that position?

A. I serve as that position, in both positions.

Q. So now not only are you the branch manager, but you are also the sales manager?

A. In essence, yes.

Q. Would it be fair to say that that position [58] was eliminated?

A. I don't feel that it was eliminated totally. But if you had to reduce, that's where, you know, you had to spread the work out. You had seven people reporting to me either directly or indirectly doing the work needed to be done. The work still had to be done, so you were going to do it with six. So you had to choose of those seven what six remain, and that's what it comes down to.

Q. So you made a determination that there were going to be six people that were going to continue to be employed by Ingersoll-Rand to perform their function in your branch; is that right?

A. The sales function in the branch, that's correct.

Q. But unfortunately you had seven employees?

A. That's correct.

Q. And so one of them had to go, at least as far as you were concerned?

A. That's correct.

Q. And that individual turned out to be Mr. McClendon?

A. That's correct.

* * * *

[60] Q. Okay. You had Mr. Dick Jeffries who was then the sales manager, and it's your best estimation that he had been working for eight or nine years at that point in time; is that right?

A. Yes.

Q. You had Mr. LaBlanc who had been working for Ingersoll-Rand how long?

A. About four years. And I'm not really sure of that, but that's about right.

Q. You had Mr. McClendon who had been working for Ingersoll-Rand for nine years and eight months?

A. That's correct.

Q. And you had Mr. Cagel who had been working for how long?

A. I'm going to say about eight years. And that's —it could have been seven, somewhere in there.

Q. Is it your testimony, sir, that you did not make any determination of the relative longevity of these various employees in determining who you would let go?

A. Absolutely none.

Q. They didn't play any part whatsoever?

[61] Q. What did you make the determination based on?

A. In sales, you judge in a certain area—you have to judge all the sales people and how they stack up against their territory, what they are doing, their potential for what they are doing at the time they are doing it. And if you have twenty people, you usually rate them one, two, three, four, five, six, seven, eight, nine. If you have five, six or seven, you rate them. And that's what I did.

Q. And what you are telling me, then, is that in that rating of one through seven Mr. McClendon was number seven?

A. That's correct.

Q. And what factors do you utilize in rating your people one through seven?

A. Okay. You look at obvious job performance, how they react when you are there with the customer. You look at that. That's a personal feeling. You look at how their reports are done. You look at potential with the company, where they are going, what's their next step. I mean, you are [62] looking at where we can go and how they can benefit Ingersoll-Rand Company for the long haul and short haul.

Now, a lot of things come into play in that. And you try to put all that together and make a judgment. Sometimes people come very close to each other. Sometimes one guy is ten times better than anybody else.

Q. Well, certainly profitability fits in there somewhere, doesn't it?

A. That's job performance, profitability, and how they do in the territory where they are. And that's what I mean by relationship, when you are with the company, how they interact with the customer.

Q. Are you aware of any other lawsuits, sir, relating to termination or laying off of any of these other employees?

A. No.

Q. Is this a copy of your signature, sir, that's reflected on page 4 of the Defendant's Exhibit No. 1?

A. Yes, sir.

* * * *

EXHIBIT "B"

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON,
Plaintiff,

vs.

INGERSOLL-RAND CO. d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP,
Defendant.

AFFIDAVIT OF RICHARD S. OLMAN

STATE OF NEW JERSEY)
)
COUNTY OF MORRIS)

BEFORE ME, the undersigned authority, on this day personally appeared RICHARD S. OLMAN, General Manager for Distributor Sales, Construction and Equipment Group for the INGERSOLL-RAND COMPANY, Defendant in the referenced litigation, and did on oath depose and say as follows:

> My name is RICHARD S. OLMAN. I am General Manager for Distributor Sales, Construction and Equipment Group for the Ingersoll-Rand Company. I am [an] adult and am fully capable, competent and qualified to make this Affidavit as a duly authorized representative of the Ingersoll-Rand Company. This affidavit is based upon my personal knowledge.

The employment relationship of the Plaintiff in this lawsuit, Perry McClendon, with Ingersoll-Rand was at all times, including that time period during which he was laid off (November 19, 1982) an "at-will" employment arrangement whereby employment could be terminated by either the employer or the employee at any time and for any reason or for no reason. The "at-will" relationship was never altered in any respect either in writing or orally.

I am also familiar with the "Compensation Arrangement" customarily used with the sales personnel such as the Plaintiff. This arrangement was not a contract of employment, but rather merely undertook to establish a scheme of compensation for the employee.

Mr. McClendon was laid off after my instruction to his supervisor, Mr. Warren J. Carroll, to reduce his staff pursuant to a company wide manpower reduction. This program was instituted as a measure to help counter-act the adverse impact on the company of external economic factors.

I am familiar with the pleadings on file in this cause, and I have read the foregoing Motion for Summary Judgment and know the statements of facts contained therein, and the instruments attached thereto as Exhibits, to be true and correct of my own personal knowledge, and such statements are hereby incorporated in this Affidavit as if set out verbatim.

I have made this Affidavit in support of Defendant's Motion for Summary Judgment based upon personal knowledge and am competent to testify to all matters asserted herein.

/s/ Richard S. Olman
RICHARD S. OLMAN
General Manager of Distributor Sales;
Construction and Equipment Group

SWORN AND SUBSCRIBED to before me on this the 20 day of May, 1987, witness which my hand and official seal.

/s/ Laurie A. Munro Bashard
LAURIE A. MUNRO BASHARD
Notary Public in and for the
State of New Jersey

My Commission Expires January 23, 1991

EXHIBIT "C"

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON,
Plaintiff,
vs.
INGERSOLL-RAND CO. d/b/a
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP,
Defendant.

AFFIDAVIT OF WILLIAM T. LITTLE

STATE OF TEXAS)
)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared WILLIAM T. LITTLE, attorney of record for the Defendant in the above-entitled and numbered cause, INGERSOLL-RAND COMPANY, and did on oath depose and say as follows:

My name is WILLIAM T. LITTLE. I am the attorney of record for the Defendant in the above-referenced litigation, the Ingersoll-Rand Company. I am over the age of eighteen and am fully capable, competent and qualified to make this Affidavit.

On March 19, 1985, I drafted and signed a letter to Mr. W. Allyn Hoaglund, the then acting attorney

for the Plaintiff which informed him that the pension and retirement benefits obtaining to the Plaintiff by virtue of his tenure with the Ingersoll-Rand Company had vested at the time he was laid off in November of 1982.

The instrument attached to this Affidavit as Exhibit "C-1" is what it purports to be, that being a true and correct copy of the above-referenced letter, along with the signed certified mail receipts signifying its receipt by the addressee.

I have made this authenticating Affidavit pursuant to Rule 901 of the Texas Rules of Evidence based upon my personal knowledge as to all of the matters contained herein, and am competent to testify thereto.

Further Affiant sayeth not.

/s/ William T. Little
WILLIAM T. LITTLE
Attorney of Record

SWORN AND SUBSCRIBED to before me on this the 10th day of June, 1987, witness which my hand and official seal.

/s/ Carolyn Castowe
Notary Public in and for the
State of Texas

My Commission Expires: 11-17-88

EXHIBIT "C-1"

March 19, 1985

CERTIFIED MAIL

Mr. W. Allyn Hoaglund
Helm, Pletcher & Hogan
Two Houston Center, Suite 2800
Houston, Texas 77010

RE: No. 84-44080; Perry McClendon v. Ingersoll-Rand Company; In the 133rd Judicial District Court of Harris County, Texas

SUBJECT: Eligibility for Deferred Vested Pension Plan

Dear Mr. Hoaglund:

This letter is to confirm that Ingersoll-Rand Company has determined that Mr. Perry McClendon, your client, is eligible under the terms of the Ingersoll-Rand Company Pension Plan One for a deferred vested pension payable at his normal retirement date. The amount of this deferred vested benefit expressed as a single life annuity is $373.61 per month.

I have enclosed a letter of confirmation from Mr. H. E. Doerr, the Manager of the Ingersoll-Rand Pension Plan. I have also enclosed an Ingersoll-Rand booklet entitled "Summary Plan Description" concerning this pension plan. We would appreciate it if you would forward these materials to your client at your earliest convenience.

If you have any questions about these developments, please do not hesitate to contact me.

Sincerely,

/s/ William T. Little

WTL:bd
Enclosures
RJD1/5

bcc: Mr. Anthony J. Fischer
Ingersoll-Rand Company
200 Chestnut Ridge Road
Woodcliff Lake, NJ 07675
(with enclosure)

Mr. H. E. Doerr
Manager, I-R Pension Plan
Ingersoll-Rand Company
200 Chestnut Ridge Road
Woodcliff Lake, NJ 07675
(with enclosure)

Mr. Jeffrey R. Parsons

PS Form 3811, July 1983 447-845 DOMESTIC RETURN RECEIPT

SENDER: Complete items 1, 2, 3 and 4.
Put your address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. ☐ Show to whom, date and address of delivery.
2. ☐ Restricted Delivery.

3. Article Addressed to: Allyn Naglund 2110 Houston Dr, Ste 200 Houston TX 77010

4. Type of Service: ☐ Registered ☐ Insured ☐ Certified ☐ COD ☐ Express Mail — Article Number: P560 469 095

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature — Addressee
X

6. Signature — Agent
X

7. Date of Delivery 3/22/85

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3800, Feb. 1982 * U.S.G.P.O. 1983-403-517

RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to Allyn Naglund
Street and No.
P.O., State and ZIP Code
Postage $
Certified Fee
Special Delivery Fee
Restricted Delivery Fee
Return Receipt Showing to whom and Date Delivered
Return receipt showing to whom, Date, and Address of Delivery
TOTAL Postage and Fees $
Postmark or Date
DR/mc Closing 3/19/85

EXHIBIT "A"

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

PLAINTIFF'S SECOND AMENDED ORIGINAL PETITION

[Filed July 27, 1987]

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PERRY McCLENDON, hereinafter called Plaintiff, still complaining of INGERSOLL-RAND CO. dba INGERSOLL-RAND CO. CONSTRUCTION EQUIPMENT GROUP, hereinafter called Defendant, and for cause of action and by way of amended Petition would respectfully show unto the Court and Jury as follows:

I.

Plaintiff is a resident of DeSoto, Dallas County, Texas.

Defendant has been served with citation herein and has filed its Answer. Any further service will be effected on its attorney of record.

II.

This cause of action arises out of a premature and wrongful termination of Plaintiff's employment by Defendant on or about November 19, 1982. This termination violated and breached a contract with, agreements with and promises to Plaintiff, who had worked for Defendant for some nine (9) years and eight (8) months.

III.

Defendant terminated Plaintiff one (1) day after he was notified of same, without good and reasonable cause and/or in bad faith. Said termination was without good cause and in bad faith for the reason that Plaintiff had nine (9) years and eight (8) months of service with Defendant, which was four (4) months prior to the date his retirement and pension benefits with Defendant would have vested. Furthermore, Plaintiff would show that his job position was not eliminated but filled, with another employee. Defendant's actions and wrongs as heretofore described have resulted in damage and injury to Plaintiff as hereinafter stated. Alternatively, Plaintiff would show that Defendant defrauded him of his pension and retirement benefits by terminating him four (4) months prior to his completion of ten (10) years of service. Plaintiff's termination was a willful and intentional act by Defendant.

IV.

In addition to the Defendant's breach of employment contract and Defendant's wrongful termination of Plaintiff, Plaintiff would further, or in the alternative, show that Defendant breached its duty and implied covenant of good faith and/or fair dealing in connection with Defendant's treatment and termination of Plaintiff. Defendant acted in bad faith and unfairly in dealing with Plaintiff. In this connection, Plaintiff would show that there was an unequal bargaining power between Plaintiff

and Defendant, in that Defendant had a superior power and advantage over Plaintiff, which Defendant abused; Defendant drafted the agreement and contract in question; and Defendant acted unscrupulously as the stronger party to take advantage of the Plaintiff as a weaker party who was without adequate bargaining power. Accordingly, the relationship between Defendant and Plaintiff was a special relationship, or alternatively, the type of relationship which gives rise to the implied duty and covenant of good faith and fair dealing, which Defendant breached. The above and foregoing breach was a proximate or producing cause of injury and damages to Plaintiff, both in the form of lost earnings and earning capacity, mental anguish, sleeplessness, nervousness and emotional distress. Because of the nature of this breach, Plaintiff should be entitled to both actual and exemplary damages.

V.

In addition to the above and foregoing, or in the alternative, Plaintiff would show that Defendant tortiously and intentionally inflicted emotional distress and mental anguish on Plaintiff in connection with the treatment of Plaintiff, the termination of Plaintiff and/or the handling of Plaintiff's employee benefits, profit sharing and retirement program. In this connection, Plaintiff would show that Defendant terminated Plaintiff just short of the time when, according to Defendant, Plaintiff's retirement and/or profit sharing program would have been vested. Although Defendant has later admitted that Plaintiff's retirement and profit sharing program with Defendant had already vested by the time of his termination, this admission came only after litigation had been initiated, and many months of sleeplessness, nervousness, mental anguish and emotional distress had been suffered by Plaintiff. Accordingly, Plaintiff seeks recovery because of Defendant's conduct in this regard, which proximately caused or produced injury and damages to Plaintiff.

VI.

As a consequence and result of Defendant's wrongful actions and breaches, Plaintiff has sustained a loss of income and commission, personal expense and inconvenience, loss of employee benefits and profit sharing and retirement programs, sleeplessness, nervousness and mental anguish and emotional distress. Plaintiff, therefore, seeks recovery in the amount of SEVEN HUNDRED FIFTY-THOUSAND DOLLARS ($750,000.00).

VII.

Because of the above and foregoing, Defendant should compensate Plaintiff for the above losses, injuries and damages. Furthermore, as a result of the unconscionable and willful actions of Defendant in terminating Plaintiff prior to the time that his retirement benefits had vested and awarding the sales territory he had developed to another individual without just cause, Plaintiff is entitled to recover exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00). Pursuant to Section 38.001 of the Texas Remedies Code, it has been necessary for Plaintiff to employ the undersigned counsel to represent him in this case, for which he is entitled to reasonable attorney's fees, together with pre-judgment interest on the liquidated amount of damages sustained by Plaintiff.

VIII.

At the time of his termination, Plaintiff was 45 years of age, with a life expectancy of 29.1 years according to the United States Life Tables, 1978, Volume II, Section 5, a certified copy of which will be used by Plaintiff as evidence in the trial of this case, and Defendant is hereby notified of said intent.

IX.

By reason of all of the above and foregoing, and on account of the injuries suffered by your Plaintiff on the

occasion made the basis of this suit, your Plaintiff is entitled to recover actual damages in the amount of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) and exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00).

WHEREFORE, PREMISES CONSIDERED, your Plaintiff prays that the Defendant be cited in terms of law to appear and answer herein, and that upon final trial of this case, he have judgment against the Defendant for actual damages in the amount of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) and exemplary damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00); that he have interest on the judgment at the legal rate; that he recover costs of Court in this behalf expended, and that he have such other and further relief, both general and special, legal and equitable, to which he may show himself justly entitled, and in duty bound will ever pray.

Respectfully submitted,

HELM, PLETCHER, HOGAN,
BOWEN & SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas 77019-2120
(713) 522-4550

MICHAEL Y. SAUNDERS
State Bar No. 17684000
JOHN W. TAVORMINA
State Bar No. 19681550
Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

ORDER

BE IT REMEMBERED that came on for submission Plaintiff's Motion for Leave to File Second Amended Original Petition, and the Court, after reviewing the pleadings on file, is of the opinion that said Motion is meritorious and should be granted, and it is, therefore

ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Leave to File Second Amended Original Petition shall be filed among the papers in this cause as an effective pleading; that a period of three (3) days shall lapse between the filing of Plaintiff's Motion for Leave and a ruling on Defendant's Motion for Summary Judgment; and the Court has considered Plaintiff's Second Amended Original Petition and the matters contained therein prior to any ruling on Defendant's Motion for Summary Judgment.

SIGNED this the ——— day of ———, 1987.

Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE
AND ENTRY REQUESTED:

HELM, PLETCHER, HOGAN, BOWEN & SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas, 77019-2120
(713) 522-4550

MICHAEL Y. SAUNDERS
State Bar Number 17684000
JOHN W. TAVORMINA
State Bar Number 19681550

Attorneys for Plaintiff

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

MOTION FOR LEAVE TO FILE AMENDED PETITION

[Filed July 27, 1987]

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PERRY McCLENDON, hereinafter called Plaintiff, and files this his Motion for Leave to File Plaintiff's Second Amended Original Petition prior to the time the Court has finally considered and ruled on Defendant's Motion for Summary Judgment on file herein, and in support of such Motion would respectfully show as follows:

I.

Although Plaintiff raised issues concerning Defendant's breach of duty and/or covenant of good faith and fair dealing, and also raised Defendant's intentional infliction of emotional distress and/or mental anguish in Plaintiff's Response to Defendant's Motion for Summary Judgment, and although such Response filed by Plaintiff was timely filed, Plaintiff has discovered that Plaintiff's First Amended Original Petition does not state specifically and in detail these legal theories. Plaintiff's First Amended Original Petition does set forth those legal theories very broadly and in a way which should certainly have given

fair notice to Defendant that Plaintiff was relying on those legal theories as grounds of recovery. However, as a precaution, Plaintiff would urge the Court to allow Plaintiff to file Plaintiff's Second Amended Original Petition, which specifically sets out these two legal grounds and theories of recovery explicitly and directly as separate paragraphs. Plaintiff's Second Amended Original Petition, which Plaintiff seeks leave to file, is attached hereto as Exhibit "A" and incorporated herein by reference for all purposes as if set forth verbatim.

II.

Plaintiff realizes that the Motion for Leave to File Plaintiff's Second Amended Original Petition is being filed on the same day as the hearing was set for Defendant's Motion for Summary Judgment. It is for this reason for Plaintiff seeks leave of Court to file this amended petition. Plaintiff would show that this amended petition, and the two grounds of recovery which are added thereto explicitly and specifically (as opposed to generally and broadly) will come as no surprise to Defendant because of the language of Plaintiff's First Amended Original Petition, in addition to Plaintiff's Response to Defendant's Motion for Summary Judgment. Moreover, the evidence which has been taken in the form of depositions in this case clearly indicates Plaintiff's intention to rely on such grounds of recovery, at least in part. Moreover, Plaintiff would show that the granting of this Motion for Leave to File Plaintiff's Second Amended Original Petition will not delay the disposition of this case unreasonably or unduly, and Plaintiff is most willing to agree to a continuance or rehearing of Defendant's Motion for Summary Judgment if Defendant feels further pleadings, briefs or presentation of summary judgment evidence is required to meet the specific grounds of recovery, to the extent Defendant has not already done so. Since Defendant has already addressed both of these grounds of recovery in its Motion and Responses, this should not present a problem.

III.

Plaintiff would respectfully urge that this Court delay finally considering and ruling on Defendant's Motion for Summary Judgment until this Motion for Leave to File Plaintiff's Second Amended Original Petition is considered and ruled upon by submission, three (3) days after the date of its filing.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that his Motion for Leave to File Plaintiff's Second Amended Original Petition be granted, and that such Petition be ordered filed among the papers in this cause as an effective pleading, and that such Motion be granted and the Order granting same be signed prior to the Court's finally considering and ruling on Defendant's Motion for Summary Judgment, and that the Court allow three (3) days to pass from the time of filing of this Motion for Leave and any ruling on Defendant's Motion for Summary Judgment. Good cause exists for the granting of this Motion, and Plaintiff prays that the Court so find. Plaintiff prays for such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

HELM, PLETCHER, HOGAN,
BOWEN & SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas 77019-2120
(713) 522-4550

/s/ Michael Y. Saunders
MICHAEL Y. SAUNDERS
State Bar No. 17684000
JOHN W. TAVORMINA
State Bar No. 19681550
Attorneys for Plaintiff

[Certificate of Service Omitted in Printing]

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

No. 84-44080

PERRY MCCLENDON

v.

INGERSOLL-RAND CO. dba
INGERSOLL-RAND CO.
CONSTRUCTION EQUIPMENT GROUP

ORDER

[Filed July 31, 1987]

BE IT REMEMBERED that came on for submission Plaintiff's Motion for Leave to File Second Amended Original Petition, and the Court, after reviewing the pleadings on file, is of the opinion that said Motion is meritorious and should be granted, and it is, therefore

ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Leave to File Second Amended Original Petition is hereby granted; that Plaintiff's Second Amended Original Petition shall be filed among the papers in this cause as an effective pleading; that a period of three (3) days shall lapse between the filing of Plaintiff's Motion for Leave and a ruling on Defendant's Motion for Summary Judgment; and the Court has considered Plaintiff's Second Amended Original Petition and the matters contained therein prior to any ruling on Defendant's Motion for Summary Judgment.

SIGNED this the 31 day of July, 1987.

/s/ Lamar McCorkle
Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE
AND ENTRY REQUESTED:

HELM, PLETCHER, HOGAN, BOWEN & SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas 77019-2120
(713) 522-4550

/s/ Michael Y. Saunders
MICHAEL Y. SAUNDERS
State Bar Number 17684000
JOHN W. TAVORMINA
State Bar Number 19681550

Attorneys for Plaintiff

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

April 16, 1990

Mr. Glen D. Nager
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005-2088

Re: Ingersoll-Rand Company
v. Perry McClendon
No. 89-1298

Dear Mr. Nager:

The Court today entered the following order in the above entitled case:

The motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae is granted. The motion of American Paper Institute, Inc. for leave to file a brief as amicus curiae is granted. The motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted.

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
JOSEPH F. SPANIOL, JR.
Clerk

IN THE SUPREME COURT OF TEXAS

FROM HARRIS COUNTY
FOURTEENTH DISTRICT

No. C-7973

PERRY MCCLENDON,
Petitioner

vs.

INGERSOLL-RAND COMPANY, d/b/a
INGERSOLL-RAND COMPANY,
Respondent

STAY ORDER

May 2, 1990

WHEREAS, respondent's amended motion for recall of mandate and for stay order filed herein on April 27, 1990 in the above styled and numbered cause has been granted in part by this Court, only as to the request for stay order, and

WHEREAS, on April 16, 1990, the United States Supreme Court granted Writ of Certiorari in this cause, therefore, pursuant to Rule 186(b), Texas Rules of Appellate Procedure,

IT IS ORDERED, that The Honorable Ray Hardy, District Clerk in and for Harris County, Texas, stay the enforcement of the mandate issued by this Court on December 11, 1989 in Cause Number C-7973, *Perry McClendon vs. Ingersoll-Rand Company, d/b/a Ingersoll-Rand Company Construction Equipment Group*, No. 84-44080 in the 133rd District Court, Harris County, Texas, until further order of this Court.

WITNESS, The Honorable Thomas R. Phillips, Chief Justice of our said Supreme Court, with the Seal thereof annexed at The City of Austin, on this the 2nd day of May, 1990.

JOHN T. ADAMS
Clerk

By /s/ Peggy Littlefield
PEGGY LITTLEFIELD
Chief Deputy Clerk